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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1725

COLECO INDUSTRIES, INC.,

Petitioner,

ABE BERMAN, JOSEPH RUBIN, IRVING COHEN, LEWIS M. COHEN, FREDERICK COHEN, ZELNICK, SOBELMAN & COMPANY,

Respondents.

REPLY MEMORANDUM OF COLECO INDUSTRIES, INC.

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In their Opposition to Coleco's Petition, Respondents make several assertions of fact and law which, though superficially appealing, find no support in this record or in the decisions below. The Court of Appeals' decision — upholding a ruling which thwarted Coleco from presentation of evidence critical both to claims and its defense to Respondents' counterclaims — is contrary to the decisions of other appellate courts and to the proper function of pretrial. A short reply memorandum may be helpful to assure that the Court's focus is concentrated on the issue presented.

It should be noted at the outset that Respondents do not dispute these incontrovertible record events:

1. No pretrial order — such as is contemplated by Rule 16, F.R.C.P. — limiting the issues for trial was ever entered in this case.

2. The District Judge required the parties to file elaborate pretrial memoranda listing their respective factual and legal contentions; and Coleco filed such a memorandum, 157 pages in length and containing 715 paragraphs.

3. While Coleco's Pretrial Memorandum stated Coleco would prove that Respondents' financial statement understated the cost of pools sold by $80,000, it did not specify *how* it would prove this undercosting error. Specifically, Coleco's Memorandum in no way stated that Coleco would rely exclusively on 1973 invoices as opposed to relying on 1972 invoice or invoices for both years.

4. The Court excluded evidence — regarding 1972 invoices — because Coleco had failed to seek amendment of its own Pretrial Memorandum.[1]

[1] While Coleco's summary judgment motion was predicated solely on the 1973 invoices for proof of the undercosting error, its Pretrial Memorandum in no way indicated that proof at trial would be so limited. It was only at the eve-of-trial argument on the summary judgment motion that Respondents challenged Coleco's reliance on the 1973 invoices thereby suggesting the need for proof that the 1972 invoices were no different. Respondents still fail to identify any statement in Coleco's Pretrial Memorandum which would need amendment in order to make way for such proof (See Petition, pp. 7-8). While they set out a catalogue lumping together Coleco's "pretrial assertions" (Opposition, pp. 2-3), it is only in Coleco's summary judgment motion that they can point to exclusive reliance on 1973 invoices. To the extent their catalogue refers to statements in the Pretrial Memorandum pertaining to 1973, those statements do not suggest *exclusive reliance on 1973 invoices* but rather refer to *particular events* which occurred in 1973 — i.e., the taking of an inventory in August 1973 and a subsequent analysis of inventory costs. Coleco's comparison of 1973 and 1972 invoices obviously called for no change in the Memorandum's description of these events. While Respondents assert that Coleco's Pretrial Memorandum committed it to sole reliance on 1973 invoices (Opposition, p. 6), their own references to the Memorandum establish that this was not the case.

5. As a direct consequence of its preclusion ruling, the Court rejected Coleco's $80,000 contract claim and its defense to the $400,000 counterclaim of Respondents.

The clear and unmistakable conclusion to be drawn from the foregoing is that Coleco was substantially — indeed, irreparably — damaged because it sought to offer evidence in the midst of a lengthy and complex trial which was not expressly referred to in its massive pretrial memorandum. Coleco's inability to pre-try its case on paper exactly as it sought to try it in court was not a proper basis for excluding the proferred evidence. Rather, as described in Coleco's opening brief, the "requirement of a kind of pre-pretrial special pleading" is, as Judge Clark stated, "at war with the basic concept of F.R. 16. . . ." Clark, *Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 458-59 (1961). Moreover, making lawyers try a case "twice" — once on paper and once in court — has been identified by Chief Justice Burger as the principal defect in the pretrial process. Burger, *Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 95-96 (1976).

Plainly, the decision below — authorizing preclusion of evidence not specified in a party's pretrial memorandum — cannot be minimized or justified on other grounds;[2] nor can the decision be reconciled with the purpose of Rule 16 or the decisions of the Fourth and Seventh Circuits[3] which abhor the growing abuses of the pretrial process.

[2] Respondents seek to justify the District Court's exclusion of evidence on other grounds, namely, that the evidence constituted a "sample". The evidence Coleco sought to adduce was not a sample, but an item-by-item comparison of materials purchased in 1972 and 1973. Contrary to Respondents' assertions, they would not have been prejudiced in any way by the admission of evidence regarding 1972 costs. Respondents owned and operated the business during 1972 and had access to the 1972 invoices months in advance of the trial and throughout the trial itself (Tr. 1254). Had Coleco's testimony been admitted, Respondents could easily have made their own comparison of 1972 and 1973 costs.

[3] *McCargo* v. *Hedrick*, 545 F.2d 393 (C.A. 4, 1973); *Peter Eckrich & Sons, Inc.* v. *Selected Meat Co.*, 512 F.2d 1158 (C.A. 7, 1975).

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted to resolve the Circuit conflict and to restore Rule 16 to the purposes envisioned by this Court and its framers when it was initially adopted.

Respectfully submitted,

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